Georgia Farm Bureau Mutual Insurance Companies *and* W. Scott Knight *and* Alan T. Lord. Cases 10–CA–31631–1 and 10–CA–31631–2

April 5, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On February 15, 2000, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by: (1) issuing warning letters to employees W. Scott Knight, Alan T. Lord, Janet Frix, and Thomas M. Ewing; (2) imposing onerous working conditions on the employees; (3) reducing the employees' earning potential; (4) causing the termination of employees Frix and Knight; (5) placing employees Lord and Ewing on a "work program;" and (6) discharging employees Lord and Ewing. In reaching his decision, the judge determined, inter alia, that the employees engaged in protected concerted activity when they reported to the Georgia State Insurance Commissioner's Office and the Respondent's claims department that their supervisor, Agency Manager Donia Smith, knowingly mishandled insurance claims. The judge also found that the Respondent retaliated against the employees for reporting the misconduct and that the reprisal was motivated by the Respondent's animus toward the employees' protected concerted activity.

In its exceptions, the Respondent argues, inter alia, that the employees' reporting of Smith's misconduct was not protected because it did not bear any relationship to the employees' working conditions. For the following reasons, we agree with the judge that the employees were engaged in protected concerted activity when they acted of one accord in expressing their concern about Smith's fraudulent conduct.

Insurance Sales Agents Knight, Lord, Frix, and Ewing were employed at the Respondent's Newton County Farm Bureau office. In March 1998,[2] the four agents discovered that Smith combined two unrelated claims as a single claim so that a claimant could avoid paying two deductibles. Knight and Frix also knew that Smith had combined two unrelated claims for another client shortly before the March incident. The agents were aware that insurance fraud was a violation of the Company's policy and State law, and that failure to report it could subject them to termination or other losses to their wages, terms, and conditions of employment.

Specifically, the agents' employment contracts stated that they could be immediately terminated, among other reasons, for the commission of any act of dishonesty or fraud. State Fraud Investigator Sherry Mowell also testified that any licensee under the Insurance Commissioner's office was required to report any suspected fraud to the office per the Georgia statutory code section 33116. Further, Mowell stated that, "if an employee became aware that an agency filed unrelated claims as a single claim, it would be reasonable for that employee to suspect that fraud occurred." Moreover, in its brief the Respondent effectively concedes that Smith's conduct was "unethical and immoral." Thus, the agents reasonably feared that a failure to report the suspected fraud could impact adversely on their working conditions.

In addition to contractual and regulatory requirements, the employees also feared losing clientele. Lord testified, without contradiction, that if he did not disclose the information, his customers could learn about the misconduct and consider that he was a part of the fraud. Knight's unrebutted testimony also showed that he was concerned that the Respondent, the Insurance Commission, or the public would take action against him for condoning the fraudulent conduct. For these reasons, the agents discussed Smith's fraudulent conduct among themselves and decided to report it.

As one court has stated, "Employees' activities are protected by Section 7 if they might reasonably be expected to affect terms or conditions of employment." *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981). Here, the record clearly demonstrates that the agents acted collectively to address a serious work concern that they could reasonably expect to affect their positions and their terms and conditions of employment. Thus, we find that the agents' conduct was completely within the umbrella of employees' rights that are protected by Section 7 of the

[1] We shall modify the judge's recommended Order pursuant to *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also add a provision ordering the Respondent to rescind the unlawful work program on which it placed employees Alan T. Lord and Thomas M. Ewing, and the other unlawful onerous working conditions imposed on Lord, Ewing, W. Scott Knight, and Janet Frix.

[2] All dates are in 1998, unless stated otherwise.

Act. Accordingly, we conclude that the Respondent violated Section 8(a)(1) of the Act when it retaliated against the employees for engaging in protected concerted activity for their mutual aid or protection.

2. We also affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by placing Lord and Ewing on "work programs" and by thereafter discharging them. The Respondent contends in its exceptions that it lawfully placed Lord and Ewing on work programs for failing to cooperate with Joey Keys, the new agency manager, and that it lawfully terminated them for failing to comply with the work programs. For the reasons set forth below, we find no merit in this contention.

On July 8, 1998, District Sales Manager Johnny Hightower informed Lord, Ewing, Frix, and Knight that Donia Smith resigned and that the other agency managers were upset by the agents' conduct in reporting Smith. Hightower also told them that they were "black eyes" to the Company and that they could expect very difficult times in the future as a result of their actions. Further, Hightower issued warnings to the agents for the alleged "insubordination" of going outside the chain of command and reporting Smith to the Respondent's claim department rather than the Respondent's sales department.[3] None of the agents ever received discipline of any kind in the past. In addition, in July, Director of Sales Tim Tucker told Knight to tell the other sales agents that they all would be fired if Tucker heard about any problems from the Newton County office.

As predicted by Hightower, Lord and Ewing encountered "difficult times" on February 3, 1999, when they were placed on work programs. Work programs are usually reserved for employees with poor performance records. Neither employee, however, had a poor performance record as reflected in their January 1999 performance appraisals that showed satisfactory overall ratings. In addition, as the judge found, the work programs established production goals that were "onerous" and "virtually impossible" to attain. Furthermore, although the work programs were set for an indefinite duration, both Lord and Ewing were discharged without explanation on February 22, 1999, approximately 3 weeks after they were placed on the work programs.

The judge found, and we agree, that the Respondent's animus against the employees' protected concerted activities was a motivating factor in the decision to place Lord and Ewing on work programs and to terminate them. *Wright Line*.[4] Furthermore, particularly in light of the fact that neither employee had a poor performance record, we also find that the Respondent has failed to satisfy its *Wright Line* burden of showing that it would have placed Lord and Ewing on work programs in the absence of their protected concerted activities. Given these findings, the Respondent can defend against their termination allegations only by showing that the discharges would have occurred even in the absence of the unlawful work programs. This it failed to do. Instead, the Respondent argues that the employees were discharged "because of their failure to comply with the enumerated work program." Under *Wright Line*, however, the respondent must establish that, even in the absence of the protected conduct, the discharges would have occurred for a "legitimate business reason." 251 NLRB at 1088. Obviously, the employees' failure to satisfy the requirements of the unlawful work programs is not a "legitimate business reason." In sum, the Respondent cannot rely on its commission of one unfair labor practice (placing the employees on work programs) as a defense to the claim that it committed another (discharging the employees). Accordingly, we adopt the judge's findings that the Respondent violated Section 8(a)(1) by placing Lord and Ewing on work programs and by discharging them.

3. In his decision, the judge found that the Respondent's retaliatory conduct forced Frix and Knight to quit their employment, and that accordingly Frix and Knight were constructively discharged in violation of Section 8(a)(1) of the Act. Contrary to our dissenting colleague, we agree with the judge's decision.

Under the Act, two elements must be proven to establish a traditional constructive discharge. First, the burdens imposed upon the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's protected activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). "A significant reduction in income for an indefinite period of time, causing an employee to quit and seek alternative employment, when a motive for such treatment was protected activity will establish constructive discharge." *Meadow Valley Contractors,* 331 NLRB No. 96, slip op. at 5 (2000); *Consec Security*, 325 NLRB 453 (1998), enfd. 185 F.3d 862 (3d Cir. 1999). For the following reasons, we find that the evidence establishes that Frix and Knight were constructively discharged in violation of Section 8(a)(1).

[3] Because the agents were engaged in protected concerted activity when they reported Smith to the Respondent's claims department, the judge found, and we agree, that the warnings issued to the employees violated Sec. 8(a)(1).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As stated above, the Respondent altered the agents' working conditions once they reported Smith's misconduct. First, the Respondent demanded that the employees sign their unlawful disciplinary warnings under the threat of termination. Next, the Respondent imposed onerous working conditions such as no longer permitting the four agents to write minimum coverage on casualty and property insurance policies. This caused the employees potential loss of income. The Respondent also no longer permitted the employees to imprint their names on office calendars that were used as a marketing tool to clients. Further, Keys began closely monitoring the agents' daily work routine and limited the amount of time they spent out of the office. These restrictions affected their visitations to clients and impacted on their sales.

The Respondent's retaliatory conduct was also reinforced by its derogatory remarks to the employees. In addition to telling the employees that they were "black eyes" to the Company, Hightower also told Knight that he would immediately fire Knight if Knight attempted to defend himself at a meeting with Director of Sales Tucker. Similarly, Tucker told Knight that he was "nothing but a zero in the eyes of Farm Bureau," and that Tucker would "personally come to Newton County and fire [Knight's] ass," if anything got back to Tucker. As previously stated, Knight relayed Tucker's comment about firing the agents to Frix and the other agents. In addition, Keys warned the agents that they "had better walk the line."

On December 1, Frix resigned because of the above conditions and her conclusion that she no longer had a viable career with the Respondent. In December, after Frix's resignation, Keys told the agents that if they were not happy with the Company, they could resign like Frix. In January 1999, Knight resigned as a result of Tucker's threats, the adverse working conditions, and his conclusion that he had no future with the Respondent.

Based on the totality of circumstances in this case, we find that both prongs of the *Crystal Princeton* test have been satisfied. First, we find that the Respondent's actions caused, and were intended to cause, a change in the agents' working conditions so difficult or unpleasant as to force them to resign. The changes in working conditions were not only demeaning to the employees, but they also had the potential to result in a "significant reduction in income for an indefinite period of time." *Meadow Valley Contractors*, supra. Restricting the type of insurance coverage available to the agents to sell, eliminating their marketing tools, and limiting the amount of time that the agents spent out of the office on sales calls were all substantial roadblocks in the ability of the agents to sell insurance. Even if, as contended by our dissenting colleague, "there was no showing that these employees suffered any reduction in pay or that they lost any tangible benefits," it is certainly reasonable to conclude that these measures would mean lost sales, and over time would result in a significant reduction in income for an indefinite period for agents dependent on commissions from these sales.[5] Further, Keys' statement that if the agents were not happy with the Respondent, they should resign, as did Frix, suggests that the Respondent instituted the adverse working conditions with the intention of forcing the agents to resign.

We also find that the second prong of the *Crystal Princeton* test has been established. The record shows that the burdens placed on the agents were clearly imposed because of the employees' protected activities. As a result of the employees' protected concerted activity of reporting Smith's mishandling of insurance claims, the employees were told by Hightower that they were "black eyes" to the Company and were warned by Tucker that they would be fired if Tucker heard about any problems from the Newton County office. The employees were also warned by Keys that they had better "walk the line." As the judge found, the changes instituted by Keys "were designed to harass, intimidate and closely monitor the agents whom the Respondent no longer trusted" because they had engaged in the protected concerted activity. Because both prongs of the *Crystal Princeton* test have been established, we conclude that the quits of Frix and Knight constituted constructive discharges and that the Respondent violated Section 8(a)(1) of the Act.[6]

[5] As stated above, "[T]he thrust of Board precedent on constructive discharge with regard to loss of income is that if the reduction of wages is significant and extends for an indefinite period, the reduction is so onerous as to force an employee to leave." *Consec Security,* supra, 325 NLRB at 454. Here, the potential loss of income resulting from the loss of sales is significant and would extend for an indefinite period. Although, as the dissent claims, there may have been no immediate "reduction in pay," that is so only because the employees' "pay" consisted of commissions from sales. Unlike the employer in *Consec*, which directly reduced the discriminatee's income by lowering her wage rate, the Respondent here sought to achieve its illegal objective indirectly by limiting the employees' ability to sell insurance and thus earn the commissions that constituted their livelihood. Unlike our dissenting colleague, we would not permit the Respondent to do indirectly that which the law prohibits it from doing directly.

[6] Our dissenting colleague contends that the employees' acts of voluntary quitting were inconsistent with a discriminatee's obligation to seek to mitigate damages. We disagree. "The doctrine of mitigation of damages is a remedial issue and is not a factor in determining whether a violation is established." *Consec Security*, supra, 325 NLRB at 454 (footnote omitted). The responsibility to mitigate damages "is relevant only to a determination of the remedy in the event that the constructive discharge [violation] is found." Moreover, "it is usually raised at the compliance stage of a proceeding." Id.

ORDER

The National Labor Relations Board orders that the Respondent, Georgia Farm Bureau Mutual Insurance Companies, Covington, Georgia, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Placing any employee on a work program for engaging in concerted activities protected by the Act.

(b) Reducing the earning potential of any employee for engaging in concerted activities protected by the Act.

(c) Imposing more onerous work conditions on any employee for engaging in concerted activities protected by the Act.

(d) Causing the termination of any employee for engaging in concerted activities protected by the Act.

(e) Discharging, warning, or otherwise discriminating against any employee for engaging in concerted activities protected by the Act.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Alan T. Lord, W. Scott Knight, Janet Frix, and Thomas M. Ewing full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Alan T. Lord, W. Scott Knight, Janet Frix, and Thomas M. Ewing whole for any losses of earnings and other benefits they suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Rescind the work programs that were imposed on Alan T. Lord and Thomas M. Ewing and the other unlawful onerous conditions imposed on Lord, Knight, Frix, and Ewing.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, warnings, and other unlawful actions, and within 3 days thereafter notify Alan T. Lord, W. Scott Knight, Janet Frix, and Thomas M. Ewing in writing that this has been done and that the discharges and unlawful actions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Macon, Georgia and Covington, Georgia, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues in all respects except in regard to their finding that the Respondent unlawfully and constructively discharged employees Janet Frix and Scott Knight.

To establish a constructive discharge under Board precedent as set forth in *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976), the General Counsel must establish that:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

I accept my colleagues' conclusion that the Respondent unlawfully made certain changes in the employment conditions of employees Frix and Knight because of their protected activity. However, I cannot agree that those changes created conditions that were so intolerable as to have forced the employees' resignations. Rather, this was a case in which the employees could have accepted the

[7] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

changes and filed a charge with the Board, challenging the Respondent's actions.

In past cases, I have expressed my view that not every retaliatory act by an employer against an employee should be deemed to have forced the employee to quit.[1] Rather, it is only those employer acts which establish intolerable working conditions that justify an employee's quitting. The "constructive discharge" doctrine does not, in my view, justify an employee's quitting merely because the employer—albeit for unlawful reasons—has made it uncomfortable for that employee. By the majority's standard, almost any unlawful employer action against an employee would justify that employee's quitting. However, if an employee quits his employment because of uncomfortable but not intolerable conditions, that employee has not in fact been forced to quit. Further, in such circumstances, the employee's act of quitting is a voluntary act which adds to the damages incurred because of the unlawful conduct. It is therefore inconsistent with the obligation to mitigate damages.[2]

Here, as described by my colleagues, the Respondent unlawfully changed the working conditions of Frix and Knight. The Respondent did not permit these employees to put their names on calendars[3] and it more closely monitored their work activity. The Respondent also restricted the insurance that these employees could write, thereby causing a *potential* reduction in earnings. However, in fact, there was no showing that these employees suffered any reduction in pay or that they lost any tangible benefit. In my view, all of the Respondent's actions fall far short of creating such intolerable conditions that the employees could not realistically remain in the Respondent's employ. The employees could have continued to work and filed a charge protesting the change in working conditions. The remedy for the change would make them whole. I would thus dismiss the complaint on the constructive discharge allegations.

My colleagues assert that a "significant reduction in income for an indefinite period of time" creates such a difficult or unpleasant condition as to force the employee to resign. Even assuming arguendo the validity of that proposition, it does not cover the situation involved herein. There is no showing that there was any reduction in income, let alone a "significant" reduction. At most, as my colleagues concede, there was only a "potential" loss of income. Without suffering any loss, and (necessarily) without ascertaining whether any loss would be significant, these employees simply quit. I would not reward them with backpay.

[1] See my dissenting opinions in *L.S.F. Trucking, Inc.*, 330 NLRB 1054 (2000), and *Consec Security*, 325 NLRB 453 (1998).

[2] See my dissent in *Consec Security*, supra.

[3] Sales agents generally ordered calendars with their names imprinted on them and used the calendars as a marketing tool.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT place any employee on a work program for engaging in concerted activities protected by the Act.

WE WILL NOT reduce the earning potential for any employee for engaging in concerted activities protected by the Act.

WE WILL NOT impose onerous work conditions on any employee for engaging in concerted activities protected by the Act.

WE WILL NOT cause the termination of any employee for engaging in concerted activities protected by the Act.

WE WILL NOT discharge, warn, or otherwise discriminate against any employee for engaging in concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Alan T. Lord, W. Scott Knight, Janet Frix, and Thomas M. Ewing full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Alan T. Lord, W. Scott Knight, Janet Frix, and Thomas M. Ewing whole, with interest, for any loss of earnings and other benefits they suffered as a result of our discrimination against them.

WE WILL rescind the work programs imposed on Alan T. Lord and Thomas M. Ewing and the other unlawful onerous working conditions imposed on Lord, Ewing, Frix, and Knight.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlaw-

ful discharges, warnings and other unlawful actions, and WE WILL, within 3 days thereafter, notify Alan T. Lord, W. Scott Knight, Janet Frix, and Thomas M. Ewing in writing that this has been done and that the discharges will not be used against them in any way.

GEORGIA FARM BUREAU MUTUAL INSURANCE COMPANIES

Lisa Henderson, Esq., for the General Counsel.
Duke Groover Jr., Esq. and *Denmark Groover, Esq. (Groover & Childs),* for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on October 28 and 29, 1999, in Covington, Georgia, pursuant to a consolidated complaint issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on July 30, 1999. The complaint is based on charges filed against Georgia Farm Bureau Insurance Companies (the Respondent or the Company) by W. Scott Knight, an individual, in Case 10–CA–31631–1 and Alan T. Lord, an individual in Case 10–CA–31631–2. The consolidated complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) through its supervisors and agents by disciplining its employees; warning its employees; denying its employees promotions; requiring its employees to submit to interrogation, threatening its employees; reducing the earnings potential of its employees; imposing more onerous working conditions on its employees; causing the termination of its employees; placing its employees on work programs; and discharging employees because they engaged in protected concerted activity. The complaint as amended at the hearing is joined by the answer of Respondent as amended at the hearing wherein Respondent denies the commission of any violations of the Act. Respondent also raises certain affirmative defenses in its answer and at the hearing.

On the entire record in this case including the credited testimony of the witnesses who testified herein, the exhibits received in evidence and the positions of the parties at the hearing and upon review of their briefs filed after the close of the hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. The Business of Respondent

The complaint alleges, Respondent admits, and I find that at all times material, Respondent has been a Georgia corporation with offices and places of business in Macon and Covington, Georgia, and has been engaged in the sale and servicing of property and casualty insurance, that during the past year, a representative period of its operations, in conducting its operations it had a gross volume of business in excess of $500,000, that it has a relationship with the American Farm Bureau Insurance Company located in Park Ridge, Illinois, under which arrangement it from time-to-time seeds portions of its losses in excess of specified figures which arrangement is called a reinsurance treaty, and the moneys paid by Respondent under the arrangement to the American Farm Bureau exceed $50,000 a year. Based on the foregoing, I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Facts

Respondent is a mutual insurance company and employed four sales agents at its Newton County Farm Bureau's office who reported to the Agency Manager Donia Smith. The four sales agents were W. Scott Knight, Alan T. Lord, Janet Frix, and Thomas M. Ewing, who were employees of Respondent who sold insurance from Respondent's Newton County office in Covington, Georgia. Additionally, the Newton County Farm Bureau employed a secretary, Karin Byous, who did work for the agents. On March 1998, Ben Marks, a Newton County Farm Bureau officer presented two separate insurance claims for himself to secretary Byous and told her to process them as one claim in order for him to only be required to pay one deductible amount rather than two for the two separate claims. Byous declined to do so contending that this was fraudulent. Ben Marks then directed her to give the claims to Supervisor Donia Smith for processing as a single claim. Byous gave Smith the claim but stated that she (Byous) would not sign it. The conversation was overheard by Agents Ewing, Frix, and Knight. Later that day, Ewing was told by Smith that she had "taken care of things" by combining Marks' claims.

Later that month, Smith told Frix that she could not believe that Byous had spoken to Marks in that manner. Frix then told Smith, "Well that's fraud." Smith did not reply to this comment by Frix. Shortly prior to this incident Smith had told Knight and Frix that she was going to combine two unrelated claims of an elderly lady, Bessie Galloway, in order to avoid Galloway being required to pay two deductibles. The General Counsel elicited unrebutted testimony that Smith's actions were in violation of company policy and State law. This alarmed the four sales agents who discussed the matter among themselves and determined that Knight and Lord would take action to report this perceived fraud on the part of Smith. Initially, Lord contacted the State Insurance Commissioner's office and was advised to handle it through Respondent's internal processes. Lord and Knight then contacted Respondent's claims adjuster, Otis Criswell, who said he would call the matter to the attention of District Claims Manager Mike Weaver. However, in early May, Lord, and Knight learned that Marks' claim had been paid. They again contacted Criswell who assured them he had brought the matter to Weaver's attention.

In May 1998, Lord asked training agent, Ewing, how to proceed with the employees' concern about the perceived fraud.[1]

[1] Ewing worked in the Georgia Farm Bureau system for 41 years. He worked as a volunteer for many years at the county and state levels and was president of the Newton County Farm Bureau for 9 years. He served on the Georgia Farm Bureau Board and as vice president of Georgia Farm Bureau Federation. In 1988, Ewing was elected president of the Georgia Farm Bureau Federation and its affiliated companies (including Georgia Farm Bureau Mutual Insurance Companies). He served in this capacity for 6 years. (T. 146.)

Ewing recommended that Lord speak to Roy Cox, director of claims and telephoned Cox who was retiring since Ewing had been invited to his retirement party. After a lengthy discussion with Cox concerning his retirement plans, Ewing broached the matter with Cox and asked if he would be willing to speak to Lord about it. Cox agreed, and Lord telephoned Cox and informed him of the handling of the claims. Cox looked into the matter briefly and concluded the handling of the claims was irregular. On May 28, Cox sent a memo to Director of Internal Audits Rod Oleson requesting that the agents and secretary Byous be contacted at their homes, as per their request to investigate the perceived fraudulent handling of the Marks and Galloway claims by Manager Donia Smith.

Subsequently, on June 23, Oleson and District Sales Manager Johnny Hightower arrived at the Covington office to investigate the matter and met individually with each of the four agents. They asked Lord why he contended that Smith's actions were fraudulent and why he had reported this to Claims Director Cox rather than up the sales division chain of command.

Frix testified that shortly after this Donia Smith told Frix she was upset with the agents' actions in reporting her. She also told Frix it would help her if she called Oleson and changed her account of the matter concerning Smith. Frix refused to do so. Smith also met with Knight and Lord and expressed her dismay and anger at them for reporting her. On July 1, Smith told Ewing she was in danger of losing her job and later that day she told Frix that she, Knight, and Byous were to blame for her loss of the agency manager position.

Subsequently on July 8, Hightower met with the four agents and informed them Smith had been demoted and had resigned as agency manager. He went on to tell them that agency managers and agents across the State were upset because they had reported Smith. He told them they were "black eyes" to the Company, that their actions were not honorable, and they could expect very difficult times in the future as a result and that their actions would make it very hard for them.

Hightower told the four agents that they had been insubordinate by going outside the chain of command in reporting Smith to the claims department rather than the sales department. He also issued each of the agents warning letters for their "insubordination" and forced each of the agents to sign them under threat of termination. None of them had ever received discipline of any kind in the past. Knight had been employed by Respondent since July 1988. Lord had been employed by Respondent since January 1994. Frix had been employed by Respondent since January 1992. Although Ewing had only been employed as a training agent since October 1996, he had served the Respondent and its affiliate state organization for over 41 years as set out above. The agents also testified that they had never been informed of a chain of command prior to this and that they considered the claims department the logical place to take the complaint rather than their immediate Supervisor Smith who was the subject of the complaint. It should be noted that the claims department and the sales department are both a part of the same Company, the Respondent in this case.

Subsequently on July 23, the four agents were each required to appear before the Newton County Farm Bureau board to answer inquiries regarding Smith. Hightower told the agents to be careful at the meeting as to what they said and how they said it. He attended the meetings also. County Board President Brad Marks had sent memos to the agents and Hightower had also reiterated the message from Marks. There is no doubt that the agents were required to attend as the Board had the authority to disapprove an agent's continuation as an agent in the County. Brad Marks is the brother of Ben Marks whose claim was the subject of the inquiry that had led to Smith's removal as the agency manager. Brad Marks was secretary/treasurer of the Newton County Farm Bureau and a board member and attended the meeting. Each of the four agents described their meeting with the Board as hostile with board members peppering them with questions concerning their professional relationship with Smith, and why they had gone to Claims Director Cox. At one point a board member asked Knight if Ben Marks was involved in the claim handled by Smith. When Knight answered, "[Y]es," Hightower immediately told him his job was in jeopardy for revealing confidential information. The record in this case leaves no doubt that the board was aware that the claims submitted by Ben Marks were known by the board members to be involved in this matter.

Knight testified he went on a "needful vacation" the week after the board meeting. When he returned, Hightower told him he needed to meet with Director of Sales Tim Tucker at the home office in Macon, Georgia. Hightower cursed at Knight and told him he had "royally screwed up" by revealing confidential information in the Board meeting. He also told Knight that if he tried to defend himself in the meeting with Tucker, he would be fired immediately. In the meeting with Hightower, Tucker and Assistant Director of Sales Jack Shippey, Tucker told Knight he was "nothing but a zero in the eyes of Farm Bureau." Tucker also chided Knight that he ought to know now why he had not received the agency manager position he had applied for. Tucker also told Knight that if anything got back to him, he would "personally come to Newton County and fire (Knight's) ass." He further told Knight to tell the other agents, he had better not hear anything out of Newton County. As directed, Knight repeated the threat to Ewing, Frix, and Lord.

In early August, the Respondent appointed Joey Keys to replace Smith as agency manager. Keys had been selected for this position over Frix and Knight who had also applied although his production was substantially less than either agent. When Hightower introduced Keys to the four agents, he warned them that they had better listen to him and walk the line. Keys quickly demonstrated that he would continue Respondent's campaign against the agents for their disclosure to the claims department of the claim handling by Smith. Although Ewing who had served in the Respondent's hierarchy for many years, offered to introduce Keys to local bank presidents and officials, this offer was declined by Keys. Keys, who did not testify, initiated a number of changes which in combination went beyond those to be expected of a new manager in a neutral change of leadership. Rather, I find that these changes were designed to harass, intimidate, and closely monitor the agents whom Respondent no longer trusted because of their reporting of the handling of the Marks and Galloway claims to the claims department. Thus, working conditions deteriorated under Keys' management. Friday casual days were discontinued. The agents

were no longer permitted to order office calendars with their names imprinted on them which was the loss of a significant marketing tool to them. The agents testified that Keys notified them that they could no longer write minimum coverage auto insurance policies and imposed a $300,000 liability minimum on homeowner's insurance policies, both of which restrictions had the potential of causing a loss of business to the agents. In addition, Keys ordered that all mail be routed through him rather than directly to the agents as in the past. He also required close monitoring of the whereabouts of the agents and initiated work reviews. It is clear that these changes were designed to frustrate and belittle the agents and restrict their abilities to perform their jobs as they had in the past all without prior discipline and whose sales production figures were above average.

Frix resigned on December 1, as a result of these conditions and her conclusion that she no longer had a viable career with Respondent. In response to this resignation, Keys told the agents that if they were not happy with Respondent, they should do as Frix did and resign. In January 1999, Knight resigned as a result of the threats by Tucker, the adverse working conditions and his conclusion that he had no future with Respondent.

On January 22, 1999, Lord and Ewing were given their performance appraisals by Keys who rated both as satisfactory overall and included some positive comments about their performance. On February 3, 1999, there was an unprecedented meeting held among Respondent's top management officials held in the Newton County office including the Agency Manager Keys, its District Sales Manager Hightower, its Director of Sales Tim Tucker, Assistant Director of Sales Jack Shippey, and the president of the Georgia Farm Bureau, as well as the district 3 manager of the Georgia Farm Bureau Federation, Rickey Lane. On the following Monday, Ewing and Lord were placed on work programs normally reserved for employees with poor performance records. In fact, Ewing had successfully completed his training agent program in the fall of 1998 and both Lord's and Ewing's production records were demonstrative of successful performance. The overall Newton County office production figures were also well above the averages of other agency office production figures.

The work program set onerous and virtually impossible production goals to be met by Lord and Ewing. It also barred the acceptance of telephone calls from exagents and barred their discussion of the work program with anyone other than Keys and Hightower without requesting permission to go up the "chain of command." It also provided that under no circumstances were they to discuss the work program with anyone outside of Farm Bureau management. Ewing objected to the program, told Hightower he was cutting his head off a little at a time and stated he did not wish to sign it. Hightower told him he had no choice but to sign it to continue his employment. Lord also signed his work program. The work program was to be of indefinite duration but on February 22, 1999, both Lord and Ewing were terminated without explanation with High-tower merely telling them he had been ordered to terminate them. At the hearing, Hightower testified that Tucker had made the decision to terminate the two agents' contracts. Tucker testified only in generalities as to the reasons for their terminations and deferred to Hightower and Keys as to the specifics. As noted above Keys was not called by Respondent to testify giving rise to the inference that his testimony would not have been favorable to Respondent's position in this case. Hightower also offered no specific substantive reasons for Respondent's treatment of the agents.

Analysis

I find that Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint by:

1. reducing the earning potential of its employees;
2. imposing more onerous working conditions on its employees;
3. causing the terminations of its employees Janet Frix and W. Scott Knight;
4. placing its employees Alan Lord and T. M. "Mort" Ewing on a "work program"; and
5. discharging its employees Alan Lord and T. M. "Mort" Ewing.

This case involves the engagement in protected concerted activity by the four agents, Respondent's animus toward these employees' engagement in the protected concerted activity, and its relentless retaliation against these employees for their engagement in the protected concerted activity.

There is ample evidence that the employees were engaged in protected concerted activity. On their discovery of the apparent mishandling of the Marks' and Galloway's claims the employees were placed in a vulnerable and tenuous position as a result of the potential threat to their positions and terms and conditions of employment if they were determined to have acquiesced in this activity by failing to report it. There is no question that insurance fraud is a felony under State law. Certainly its participation therein violates state licensing requirements for insurance agents and the conditions set out in the individual contracts that the agents signed with the Respondent in order to serve as agents. Thus it is clear that at a minimum the agents' tenure with Respondent was in jeopardy once they learned of the mishandling of the claims by Smith. If they failed to report it, they could have been subject to termination. As it turned out, they were also in jeopardy of losing their jobs if they reported it in a manner deemed unacceptable by Respondent's management. There is no question that the agents discussed the problem at length among themselves and determined to take action to report it to the claims department which they considered to be the logical place to report a mishandled claim. Respondent retaliated against them by the issuance of a written warning which is not alleged as a violation because of 10(b) considerations regarding the filing of charges within 6 months of a violation of the Act. The warning was issued for having failed to follow the "chain of command" up through the sales department which included the Supervisor Smith who was involved in the mishandling of the claim. The Respondent failed to produce explicit testimony or evidence that the agents had ever been advised to follow the sales department, "chain of command" in reporting mishandled claims. I credit the agents' testimony that they had not been so advised. Furthermore, there is no evidence of any impropriety on the part of the agents in reporting the matter to the claims department which is a part of Respondent just as is the sales

department. The sales department's objection to the reporting of the mishandled claim to the claims department is a puzzle. Whether it was a concern of the potential embarrassment to the sales department, an attitude that this was a minor matter which could have been readily handled by the sales department or a concern for the persons involved is a matter of speculation.

In any event it is clear that the agents engaged in protected concerted activity in reporting the mishandled claim to the claims department. *Transpac Fiber Optics*, 305 NLRB 974 (1991); *Daniel Construction Co.*, 277 NLRB 795 fn. 4 (1985); *Systems With Reliability, Inc.*, 322 NLRB 757, 760 (1996); and *Arrow Electric Co.*, 323 NLRB 968, 970 (1997).

There is overwhelming evidence in this case that Respondent retaliated against the agents and that the retaliation was motivated by Respondent's animus toward them for their engagement in the protected concerted activity of reporting the mishandled claims to the claims department. This is true of the derogatory remarks made to them by Respondent's management, the warnings issued to them, the onerous working conditions imposed on them, the restrictive working conditions giving rise to a potential loss of income, the constructive discharge of Frix and Knight, the impositions of the work program on Lord and Ewing and the discharge of Lord and Ewing. Thus, the General Counsel has made a prima facie case of all of the violations of Section 8(a)(1) as alleged in the complaint.

With respect to the constructive discharge of Frix and Knight, I find that the onerous conditions imposed on them did cause and were intended to cause a change in their working conditions so as to force their resignation and that they were subjected to these onerous conditions because of their engagement in protected concerted activity. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

With respect to the imposition of the work program on Ewing and Lord and their ultimate discharge by Respondent it is clear that this was the final step in Respondent's campaign to rid itself of all four agents who had engaged in the protected concerted activity.

I find Respondent has failed to rebut the prima facie cases of violations established by the General Counsel. *Wright Line*, 251 NLRB 1083 (1980); *Kysor Industrial Corp.*, 309 NLRB 237 (1992).

B. The Late Filed 10(b) Defense

In its posthearing brief, Respondent asserts for the first time in this proceeding that the addition of Janet Frix's constructive discharge filed in the amended charge of July 12, 1999, is untimely. I find however that this allegation is not time barred under Section 10(b) of the Act. The Respondent did not raise this defense in its answer to the complaint or at the hearing but did so only in its posthearing brief in this case. Since Section 10(b) is an affirmative defense and was not timely raised it is accordingly untimely in this case. *Prestige Ford*, 320 NLRB 1172 fn. 2 (1996); *Public Service Co.*, 312 NLRB 459, 461 (1993).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) and (5) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act as set out in the foregoing decision.
3. The above unfair labor practices in connection with the business of Respondent have the effect of burdening commence within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated the Act, it shall be ordered to cease and desist there from and to take certain affirmative actions including the rescinding of the unlawful onerous conditions imposed on the agents, the constructive discharge of Frix and Knight, the imposition of the work program on Ewing and Lord and the discharge of Ewing and Lord. It shall also be ordered to purge its records of all references to the unlawful actions taken against Frix, Knight, Ewing, and Lord and to offer them reinstatement to their former positions or to substantially equivalent positions if their former positions no longer exist without prejudice to their seniority or other rights or privileges previously enjoyed or to which they would have been entitled in the absence of the discrimination against them from the date of their discharges. I also recommend that Respondent make the employees whole for any loss of earnings and benefits they sustained as a result of the discrimination against them. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[Recommended Order omitted from publication.]